

This letter discusses the applicable sales tax rates for food. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

October 22, 2013

Dear Xxxxx:

This letter is in response to your letter dated July 9, 2013, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings (“PLRs”) are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department’s regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter (“GIL”) is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I am the owner of three (3) separate entities, each of which owns a retail COMPANY in the State of Illinois. The entities and their sales tax numbers are as follows:

<u>Name</u>	<u>Sales Tax Number</u>
ENTITY1	XXXX-XXXX
ENTITY2	XXXX-XXXX
ENTITY3	XXXX-XXXX

Each of these are retail establishments:

1. Prepares food and soft serve dairy products for immediate consumption on the premises.
2. Sells the items referenced in paragraph #1 through the drive-thru window for consumption off-premises.
3. Each of these Stores make ice cream cakes, which are displayed in a glass freezer and/or are made to order based upon a customer’s placing an order. The customer picks up and pays for each cake at the counter inside the Store and

removes the cake off-premises. The Stores do not have or provide plates, tableware, etc. so that the cakes may be served on the premises.

4. Each of these stores purchases manufactured novelties that come in a large case, and each case includes smaller boxes which contain 6 to 8 separate ice cream novelty products, such as fudge bars, ice cream 1, vanilla-orange bars, ice cream sandwiches, and ice cream 2. These are then sold by the box at either the counter or drive-thru for consumption off the premises.

5. In regard to the manufactured novelties referenced in paragraph #4, the Stores separately sell one (1) novelty at a time, after first opening the boxes, for consumption on premises.

6. The Stores also manufacture ice cream 1, place them in a fairly tight small individual bag, and then place 10 of these individual bagged ice cream 1 in a large sack and sell them in bulk (10 at a time). These are also purchased at the counter at the store and at the drive-thru. These are not sold for consumption on the premises.

7. Each of these COMPANY Stores has a drive-thru where food is passed through the drive-thru windows into the car and where the customer makes payment. After payment, the customers drive off in the car and leave the premises. Some will consume the food in their cars and some will wait to arrive at their destinations.

Note: It is my information that local grocery stores prepare cakes for resale, along with various ice cream novelty products in boxes for consumption off the premises, which products are sold at the low 1% sales tax rate.

I am requesting a ruling in regard to each of the captioned 3 store and related sales tax numbers concerning the following questions:

1. Are the ice cream cakes referenced above sold for consumption off premises subject to the high rate or the low 1% sales tax rate?

2. Are the boxes of the above referred to ice cream novelty products that are sold for consumption off the premises subject to the high rate or the low 1% rate.

3. Are the ice cream 1 that we make / manufacture on the premises that are sold in bags of 10 for consumption off the premises subject to the high rate or the low 1% sales tax rate?

4. Are drive-thru sales of prepared food and soft serve products for consumption off premises subject to the high rate or low 1% rate?

The foregoing requested rulings pertain to Title 86 Part 130 Section 130.310.

I represent unto you that the facts herein contained are true and accurate and that I am the authorized officer on behalf of each of the 3 entities in order to request these rulings. Thank you.

DEPARTMENT'S RESPONSE:

The manner in which food is taxed depends upon the nature of the establishment that is selling the food. Retailers who provide seating or facilities for on-premises consumption of food generally incur tax at the high rate (6.25% State rate) on all food sales (including grocery type items). However, if establishments sell both food that has been prepared for immediate consumption and grocery type items and also provide facilities for on-premises consumption, the lower rate of tax (1%) may be charged on the grocery type items (other than alcoholic beverages, candy, soft drinks, and food that has been prepared for immediate consumption) if the dining facilities are physically partitioned from the area where food not for immediate consumption is sold and these facilities utilize a separate means of collection of receipts. *See* 86 Ill. Adm. Code 130.310(b)(1).

Food for immediate consumption is defined in the regulation as food made ready by the retailer to be eaten without substantial delay after the final stage of preparation by the retailer. *See* 86 Ill. Adm. Code 130.310(c)(2). Foods sold in a restaurant are typically considered prepared for immediate consumption. *See* 130.310(d)(4)(C). This would include food sold through the drive thru window even though it will be eaten off the premises because it is prepared for immediate consumption. We recognize that you also sell ice cream cakes and pre-packaged bulk ice cream items. The regulations address this scenario at 86 Ill. Adm. Code 130.310(b)(1). Ice cream cakes and items sold in bulk such as the boxes of ice cream novelty products would be taxed at the low rate if you otherwise meet the criteria in 86 Ill. Adm. Code 130.310(b)(1). When a retailer provides on premises seating the low rate only applies to certain foods if the area for on premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and the retailer utilizes a means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption and the sales of food that are not prepared for immediate consumption. This can be accomplished simply by using a cash register that separately identifies high rate and low rate sales or by using separate registers for high rate and low rate sales. Assuming you meet these criteria, we believe the ice cream cakes and prepackaged boxes of novelty ice cream products would be taxed at the low rate. The individual ice cream bars that you sell are subject to tax at the high rate whether they are purchased in the store or in the drive-thru. *See* 86 Ill. Adm. Code 130.310(d)(4)(F) for more information about ice cream and ice cream cakes.

In sum, if your restaurant has seating for consumption of food, we presume that all of your sales are taxable at the high rate. If you have a physical separation between the dining area and the area where you sell food not for immediate consumption and you have a separate means of recording and accounting the sales receipts of high and low rate foods, the low rate will apply to qualifying foods that are not prepared for immediate consumption such as ice cream cakes.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Cara Bishop
Associate Counsel

CB:msk